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## Congress' Latest Attempt to Abrogate States' Sovereign Immunity Defense Against Copyright Infringement Actions: Will IPPRA Help the Music Industry Combat Online Piracy on College Campuses?

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## **CONGRESS' LATEST ATTEMPT TO ABROGATE STATES' SOVEREIGN IMMUNITY DEFENSE AGAINST COPYRIGHT INFRINGEMENT ACTIONS: WILL IPPRA HELP THE MUSIC INDUSTRY COMBAT ONLINE PIRACY ON COLLEGE CAMPUSES?**

This article examines State's sovereign immunity from suits for damages arising out of copyright infringement, and the burden that this immunity places on the music industry and its efforts to combat music piracy on college campuses. This article also reviews the Intellectual Property Protection Restoration Act of 2001 – a legislative initiative before the current Congress that purports to abrogate States' immunity from suits for damages.

### **I. INTRODUCTION**

Since the advent of the Internet, the music industry has faced an uphill battle in its attempts to exploit this new medium before involuntarily exploitation by music pirates. For all their efforts, however, music pirates seem to be winning. As Internet usage expands, so has a feeling – particularly among college students – of which music downloads should be free.<sup>1</sup>

Music piracy on college campuses has become widespread. At least one university found their campus network so overwhelmed by music downloads that they set up a server specifically to facilitate music downloads.<sup>2</sup> Furthermore, in 2000 alone, the Recording Industry Association of America's ("RIAA") Anti-Piracy division sent 507 notifications of infringement to colleges

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<sup>1</sup> A & M Records, Inc. v. Napster, Inc., 114 F. Supp.2d 896, 910-911 (N.D.Ca. 2000)(citing Teece Rep. 14-18).

<sup>2</sup> *Gnutella Server Convenient but Ethically Dubious*, THE STANFORD DAILY (via University Wire), Nov. 29, 2001. (Student editorial discusses the ethical repercussions of designating a Gnutella server for student use as a method of relieving the congestion on the school's research network, and whether the Gnutella server contravenes the school's policy against copyright infringement).

and universities,<sup>3</sup> per the notice requirements set forth in Section 512 of the Digital Millennium Copyright Act (“DMCA”).<sup>4</sup> While that number indicates that the problem of music piracy on college campuses is severe, the RIAA statistics do not and cannot take into account infringing activity that takes place entirely on universities’ intranets, shielded from detection by firewalls.

When infringing activity on college campuses is detected, another chink in the music industry’s armor may be exposed—the inability to sue state instrumentalities for damages arising from copyright infringement due to Eleventh Amendment sovereign immunity.<sup>5</sup> Under current law, copyright owners may enjoin the infringing activity of states, but they may not recover damages unless the state expressly waives its sovereign immunity and consents to the action. Therefore, some educational institutions—those that are considered state instrumentalities for the purposes of the Eleventh Amendment—are immune from suits for damages, while privately owned educational institutions are not.

Part II of this note traces the historical development of Eleventh Amendment jurisprudence as it relates to copyright law, and examines the current legal environment. Part III explores the potential problem posed to copyright owners by the Eleventh Amendment bar. Lastly, Part IV examines the most recent legislative initiative designed to overcome the Eleventh Amendment obstacle to copyright actions for damages against states, the Intellectual Property Protection Restoration Act of 2001 (“IPPR”).

## II. THE EVOLUTION OF THE ELEVENTH AMENDMENT AS A BAR TO COPYRIGHT ACTIONS

Prior to 1985, there seemed to be no doubt that the states both enjoyed the benefits and bore the burdens of federal intellectual

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<sup>3</sup> *RIAA 2000 Yearend Anti-Piracy Statistics*, at [http://www.riaa.com/pdf/2000\\_Yearend\\_Anti-Piracy.4.pdf](http://www.riaa.com/pdf/2000_Yearend_Anti-Piracy.4.pdf) (last visited Jan. 1, 2002).

<sup>4</sup> 17 U.S.C. § 512(c)(3) (1999).

<sup>5</sup> U.S. CONST. amend. XI.

property laws.<sup>6</sup> The states, in fact, participate freely in the federal intellectual property system, with state institutions of higher learning holding a total of more than 32,000 copyright registrations alone.<sup>7</sup> Then, in 1985, the Supreme Court announced the “clear statement” rule in *Atascadero State Hospital v. Scanlon*,<sup>8</sup> requiring Congress to clearly articulate by statute its intention to abrogate States’ sovereign immunity under the Eleventh Amendment.

After *Atascadero*,<sup>9</sup> some courts held that intellectual property laws lacked a “clear statement,” and therefore, actions against states and state entities could not be maintained in federal courts.<sup>10</sup> As both copyright and patent actions are within the exclusive jurisdiction of the federal court system,<sup>11</sup> Congress accordingly feared that intellectual property owners would be left without an adequate remedy for state infringement of intellectual property.<sup>12</sup> Consequently, in 1990 and 1992, Congress unanimously passed a series of laws—the Patent and Plant Variety Protection Remedy Clarification Act,<sup>13</sup> the Copyright Remedy Clarification Act,<sup>14</sup> and

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<sup>6</sup> 147 Cong. Rec. S11,363, 11,364 (daily ed. Nov. 1, 2001) (statement of Sen. Leahy).

<sup>7</sup> *Report to the Honorable Orrin G. Hatch, Ranking Minority Member, Committee on the Judiciary, U.S. Senate: State Immunity in Infringement Actions* (GAO-01-811, Sept. 25, 2001) at 45 [hereinafter *GAO Report*].

<sup>8</sup> 473 U.S. 234, reh’g den. 473 U.S. 926 (1985).

<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g.,* *Chew v. California*, 893 F.2d 331 (Fed. Cir. 1990) (holding that patent laws failed to evince a “clear statement” of congressional intent to abrogate Eleventh Amendment); *Kersavage v. Univ. of Tennessee*, 731 F. Supp. 1327 (1989) (holding that a State university was immune from patent infringement action); *BV Engineering v. Univ. of California*, 858 F.2d 1394 (9th Cir. 1988) (holding that a State university was entitled to Eleventh Amendment immunity from a copyright infringement action).

<sup>11</sup> 28 U.S.C. 1338 (1994).

<sup>12</sup> 147 Cong. Rec. S11,363-01, 11,365 (daily ed. Nov. 1, 2001) (statement of Sen. Leahy). While patent and copyright actions fall under the exclusive jurisdiction of the federal courts, state remedies for infringement may still exist via reverse condemnation proceedings or a conversion claim. *Florida Prepaid Postsecondary Education Expense Board v. College Savings*, 527 U.S. 627, 644 (1999).

<sup>13</sup> Pub. L. No. 102-560 (1992).

the Trademark Remedy Clarification Act<sup>15</sup> [hereinafter collectively referred to as “Remedy Acts”]—for the purpose of making it “absolutely, unambiguously, 100 percent clear that Congress intended the patent, copyright and trademark laws to apply to everyone, including the States.”<sup>16</sup>

Only a year before the passage of the Remedy Acts, the Supreme Court decided *Pennsylvania v. Union Gas Co.*,<sup>17</sup> holding that Congress could abrogate States’ sovereign immunity through their Article I Commerce Clause powers.<sup>18</sup> Therefore, Congress had no compunctions about resting the authority of the Remedy Acts on its Article I powers.<sup>19</sup> However, Congress’ faith in its Article I powers was misplaced.

In 1996, the Supreme Court “redefined” its position; the “clear statement” rule no longer sufficed to abrogate States’ sovereign immunity. In *Seminole Tribe of Florida v. Florida*,<sup>20</sup> the Court expressly overruled *Union Gas*,<sup>21</sup> holding now that Congress lacked the power to abrogate Eleventh Amendment sovereign immunity under its Article I powers.<sup>22</sup> The Court noted, however, that abrogation of sovereign immunity was still viable under section 5 of the Fourteenth Amendment.<sup>23</sup> The Court stated that this distinction was proper because “through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that Section 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.”<sup>24</sup> Simply stated, Article I powers cannot intrude upon the later-enacted

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<sup>14</sup> Pub. L. No. 101-553 (1990).

<sup>15</sup> Pub. L. No. 102-542 (1992).

<sup>16</sup> 147 Cong. Rec. 11,363-01 at 11,365.

<sup>17</sup> 491 U.S. 1 (1989).

<sup>18</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>19</sup> John T. Cross, *Suing the States for Copyright Infringement*, 39 BRANDEIS L.J. 337, 346 (2000).

<sup>20</sup> 317 U.S. 44 (1996).

<sup>21</sup> 491 U.S. 1 (1989).

<sup>22</sup> 517 U.S. at 66.

<sup>23</sup> *Id.* at 59.

<sup>24</sup> *Id.*

Eleventh Amendment, whereas the Fourteenth Amendment—enacted after the Eleventh Amendment—can be used to effectively abrogate States' immunity.<sup>25</sup>

Then, in 1999, the Supreme Court removed any lingering doubts anyone may have held regarding the constitutionality of the intellectual property Remedy Acts. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>26</sup> the Court held that Congress lacked the authority under its Article I powers to abrogate States' sovereign immunity in patent infringement actions, notwithstanding the "clear statement" of intent to do so.<sup>27</sup> In deciding *Florida Prepaid*,<sup>28</sup> the Court once again affirmed Congress' ability to abrogate States' sovereign immunity via the Fourteenth Amendment, but concluded that, in order for abrogation to be effective, legislation must be "appropriate" to remedy Fourteenth Amendment violations by the States.<sup>29</sup>

In *Florida Prepaid*,<sup>30</sup> the United States and plaintiff College Savings argued that the Remedy Act prevented a state from depriving a patentee of property without due process of law.<sup>31</sup> College Savings also justified the Remedy Act based on a theory of "taking" without just compensation—a theory the United States declined to support.<sup>32</sup> As the legislative history of the Remedy Act did not rely on a takings theory, nor did the government assert such theory on brief, the Court focused its discussion on the denial of due process arguments asserted.<sup>33</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> 527 U.S. 627 (1999).

<sup>27</sup> *Id.* College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999), decided the same day, held the Trademark Remedy Clarification Act, Pub. L. 102-542 (1990) unconstitutional as well. As copyrights are more analogous to patents than trademarks, this paper focuses on the *Florida Prepaid* decision.

<sup>28</sup> 527 U.S. 627 (1999).

<sup>29</sup> *Id.* at 637.

<sup>30</sup> *Id.* at 627.

<sup>31</sup> *Id.* at 641-42.

<sup>32</sup> *Id.*

<sup>33</sup> See Cross, *infra* note 19 at 354.

The Court found that in order for the abrogation to be constitutional, Congress must first find that a deprivation of due process existed and design a remedy in proportion to the harm to be prevented.<sup>34</sup> Upon reviewing the legislative history, the Court found the Remedy Act to be overly broad for two reasons. First, the evidence of infringement proffered to Congress revealed that most infringement was “innocent or at worst negligent.”<sup>35</sup> “[N]egligent conduct . . . does not violate the Due Process Clause of the Fourteenth Amendment.”<sup>36</sup> Second, the Court found that Congress failed to find a lack of adequate state processes available to remedy infringement. Without finding that property deprivations lacked a remedy, the Court concluded that Congress could not find that due process violations warranted the legislation.<sup>37</sup>

Shortly after the *Florida Prepaid* decision was handed down, the Fifth Circuit had cause to apply the decision to a copyright action against a State entity.<sup>38</sup> In *Chavez v. Arte Publico Press*,<sup>39</sup> the Fifth Circuit found that, while evidence of copyright infringements by States was greater than similar evidence in the patent arena, here again, Congress had failed to tailor the Copyright Remedy Clarification Act<sup>40</sup> so that it became operative primarily in cases where infringement rose to the level of a Fourteenth Amendment violation of due process.<sup>41</sup> Therefore, the abrogation of sovereign immunity was held unconstitutional.<sup>42</sup>

By the end of 2000, it became clear that States are wholly immune from suits for monetary damages arising out of infringements of intellectual property.

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<sup>34</sup> *Florida Prepaid*, 527 U.S. at 627.

<sup>35</sup> *Id.* at 645.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 644-45.

<sup>38</sup> *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

<sup>39</sup> *Id.*

<sup>40</sup> Pub. L. 101-553 (1990).

<sup>41</sup> *Chavez*, 204 F.3d at 607.

<sup>42</sup> *Id.*

### III. THE MUSIC INDUSTRY'S HANDICAP IN THE WAR AGAINST ONLINE PIRACY ON COLLEGE CAMPUSES

Efforts to combat music piracy on the campuses of colleges and universities are hindered by a variety of obstacles. First, the ability of copyright owners to monitor online music piracy is limited to infringing activity that occurs via the Internet; infringing activity that takes place entirely on intranets is generally undetectable. To make the task of detecting infringement ever more daunting is the rise in popularity of peer-to-peer file swapping services like Gnutella.<sup>43</sup> These peer-to-peer systems eliminate the need for a centralized server and an accompanying commercial service; without a centralized server (like Napster and its progeny) enabling the infringing activity, not only is detection unlikely, but also there is no single entity that can be held accountable in an infringement action.<sup>44</sup> These practical difficulties aside, once infringing activity is detected, stopping the infringing activity may be further complicated from a legal standpoint when the computer systems of a public institution are involved.

When infringing activity is effectuated through the use of the computer systems owned and maintained by a public institution, a particular and seemingly insurmountable obstacle is encountered: the copyright owner cannot use the threat of suit for monetary damages against the institution or its officers.<sup>45</sup> As the preceding section of this note explores, the Eleventh Amendment effectively bars monetary relief for violations of copyright when the defendant is a state instrumentality.<sup>46</sup>

Without a mechanism to exact monetary damages for copyright infringement from a state entity, the copyright owner's arsenal

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<sup>43</sup> See generally *What is Gnutella?*, at [http://www.gnutellanews.com/information/what\\_is\\_gnutella.shtml](http://www.gnutellanews.com/information/what_is_gnutella.shtml) (last visited Jan 1, 2002) (describing how the Gnutella system works).

<sup>44</sup> *Id.*

<sup>45</sup> John T. Cross, *Suing the States for Copyright Infringement*, 39 BRANDEIS L.J. 337, 340 (2000). "Thus, as things now stand, States are immune from monetary liability for copyright infringement." *Id.*

<sup>46</sup> *Id.*



against collegiate music piracy is lacking a “big gun.” It is entirely possible that a state entity can choose to disregard notices of infringement, forcing the copyright owner to pursue costly litigation that can only result in injunctive relief.<sup>47</sup> While it is unlikely that state entities will choose to engage in wholesale copyright infringement, it is very realistic to suppose that state entities will simply fail to timely block infringing content from their networks upon notification that their system is being used to facilitate music piracy. The University of Virginia, for example, refused to limit students’ access to Napster.com after they received a letter from the attorney representing Metallica and Dr. Dre requesting that they do so.<sup>48</sup> Or, public colleges and universities may choose to follow in the footsteps of privately-owned Stanford University and establish intranet servers specifically for music file-swapping use in order to decrease the demand on their Internet resources due to file-swapping activity.<sup>49</sup>

As music piracy gains acceptance and becomes more widespread among college students, copyright owners should be concerned that university officials will also become more tolerant of music file-swapping. With this tolerance may come increasing reticence to comply with copyright owners’ requests to block access of infringing content. Furthermore, as the Register of Copyrights noted in her testimony before the Subcommittee on Courts and Intellectual Property, “[i]t is only logical that in the current legal environment, without an alteration to the status quo infringements by States are likely to increase.”<sup>50</sup> Therefore, the

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<sup>47</sup> See generally *Ex Parte Young*, 209 U.S. 123 (1908) (holding that an equitable action by a private citizen against a state officer can be maintained without violating the Eleventh Amendment). “[T]he plaintiff might still have to go through an expensive and protracted lawsuit to obtain the injunction without any expectation that damages would be paid.” GAO Report, *supra* note 7, at 16.

<sup>48</sup> Kadie Bye, *Company Traces Pirated Music to Students*, *Cavalier Daily* (via University Wire), Nov. 27, 2001.

<sup>49</sup> *Gnutella Server Convenient but Ethically Dubious*, *THE STANFORD DAILY* (via University Wire), Nov. 29, 2001.

<sup>50</sup> *State Sovereign Immunity and Protection of Intellectual Property: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. (2000) (statement of Marybeth Peters, Register of

inability to secure monetary damages against state universities for copyright infringement may become more damaging to the rights of copyright owners.

#### IV. CONGRESS' LATEST ATTEMPT TO SECURE THE RIGHTS OF COPYRIGHT OWNERS

Four months after the decision in *Florida Prepaid*,<sup>51</sup> Senator Patrick Leahy introduced the Intellectual Property Protection Restoration Act of 1999 in an effort to remedy the newly created "loophole" in the federal intellectual property laws.<sup>52</sup> The bill did not receive consideration by that Congress.<sup>53</sup> Subsequently, however, Senator Orrin Hatch requested that the U.S. General Accounting Office compile a report on State immunity in infringement actions<sup>54</sup> in light of *Florida Prepaid*.<sup>55</sup>

The GAO report proffered this unsurprising conclusion: Members of the intellectual property community, including the U.S. Patent and Trademark Office and the U.S. Copyright office, agree that the current state of affairs results in an inequitable situation for intellectual property owners that should be resolved via legislation; the States do not feel a remedy is needed.<sup>56</sup>

Also extensively documented in the GAO Report is the confirmation of what intellectual property owners already knew: the current legal environment does not provide adequate remedies for intellectual property owners when their interests are infringed by state instrumentalities.<sup>57</sup> States are unwilling to voluntarily waive their immunity, and many States do not permit actions to be brought against them in their own courts.<sup>58</sup> Even when actions can

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Copyrights).

<sup>51</sup> 527 U.S. 627 (1999).

<sup>52</sup> 147 Cong. Rec. S11363-01, 11,364 (daily ed. Nov. 1, 2001) (statement of Sen. Leahy).

<sup>53</sup> *Id.*

<sup>54</sup> *GAO Report*, *supra* note 7, at 1.

<sup>55</sup> 527 U.S. 627 (1999).

<sup>56</sup> *GAO Report*, *supra* note 7, at 4.

<sup>57</sup> *Id.* at 13-24.

<sup>58</sup> *GAO Report*, *supra* note 7, at 14.

be brought in State courts, the substitute causes of action (such as conversion or reverse condemnation) are untested and potentially unavailing.<sup>59</sup> The report does reconfirm that injunctive relief is available under the doctrine of *Ex Parte Young*,<sup>60</sup> but notes that such relief is an incomplete remedy at best.<sup>61</sup>

Most alarmingly, the GAO Report states that many members of the intellectual property community fear that States—armed with full knowledge of their immunity to actions for damages—will be far less respectful of the rights of intellectual property owners, and may refuse to remedy infringement administratively, as many States have done in the past.<sup>62</sup>

The GAO solicited comments from both the U.S. Patent and Trademark Office and the U.S. Copyright Office, and included their remarks in the appendices of the Report. The comments of the General Counsel of the U.S. Copyright office were particularly instructive, recommending that Congress condition receipt of a gratuity on States' waiver of immunity in damages actions for intellectual property infringement.<sup>63</sup>

A week after the release of the GAO Report, Senator Leahy introduced a revised version of the Intellectual Property Protection Restoration Act of 1999, now titled the Intellectual Property Protection Restoration Act of 2001 ("IPpra").<sup>64</sup> Introduced on November 1, 2001 by Senator Leahy in the Senate and Representatives Howard Coble and Howard Berman in the House of Representatives, IPpra is an attempt to "level[] the intellectual property playing field"<sup>65</sup> as between states and private intellectual property owners.

IPpra contains two provisions: First, it conditions the benefit

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<sup>59</sup> *Id.*

<sup>60</sup> 209 U.S. 123 (1908).

<sup>61</sup> *GAO Report, supra* note 7, at 16.

<sup>62</sup> *Id.* at 28.

<sup>63</sup> *GAO Report, supra* note 7, at Appendix VII (letter from U.S. Copyright Office General Counsel David O. Carson).

<sup>64</sup> Intellectual Property Protection Restoration Act of 2001, S. 1611, 107th Cong. (2001).

<sup>65</sup> 147 Cong. Rec. S11 at 366 (daily ed. Nov. 1, 2001) (statement of Sen. Leahy).

of the States' ability to sue under Federal law for monetary damages for infringement of their intellectual property on States' waiver of immunity for similar actions when States are charged with infringement.<sup>66</sup> Second, it both reaffirms the availability of equitable relief for intellectual property owners as against non-waiving States, and also provides for the availability of damages when a non-waiving State's infringement rises to the level of a constitutional violation under either a takings theory or as a denial of due process.<sup>67</sup>

The first provision of IPPRA has been significantly altered from the 1999 version of the bill; this version calls for a denial of but one "'stick' from the usual bundle of rights accorded by Federal law;"<sup>68</sup> the previous version of the bill sought to deny all Federal registrations of intellectual property for non-waiving states.<sup>69</sup> The current IPPRA provision is certainly a step that will help it pass a Constitutionality test. Denying states the benefit of suits for damages is far more analogous to a constitutional coercive action based on Congress' spending powers than is a wholesale denial of access to the intellectual property system.<sup>70</sup> This provision, if passed, may well constitutionally abrogate states' sovereign immunity in infringement actions.

The second provision of IPPRA should also pass constitutional muster. This provision attempts to track the language handed down in *Florida Prepaid*,<sup>71</sup> requiring a constitutional violation of the intellectual property owner's right before any damages action may lie against a non-waiving State.<sup>72</sup> The explicit wording of this

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at S11,366-377.

<sup>68</sup> *Id.* at S11,366.

<sup>69</sup> Gilbert L. Carey, *The Resurgence of States' Rights Creates New Risk to Intellectual Property*, 11 ALB. L.J. SCI & TECH. 123, 150 (2000).

<sup>70</sup> See *Bell v. New Jersey*, 461 U.S. 773 (1983) (holding that conditioning the receipt of federal funds on acceptance of a condition does not violate States' sovereignty); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947) (holding that Congress may withhold federal highway funds to enforce compliance with federal campaign law).

<sup>71</sup> 527 U.S. 627 (1999).

<sup>72</sup> Intellectual Property Protection Restoration Act of 2001, S. 1611, 107th

provision should be effective in meeting the Supreme Court's requirements as articulated in *Florida Prepaid*.<sup>73</sup>

## V. CONCLUSION

The current legal environment surrounding copyright law in relation to States' sovereign immunity is both unjust and untenable. The status quo, particularly in light of evolving attitudes concerning music piracy, poses a serious threat to the rights of music copyright owners. IPPRA<sup>74</sup> is a positive and necessary step towards helping the music industry combat online music piracy on public college campuses, and the music industry should unite with other intellectual property owners to help support its prompt passage.

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Cong. § 5(a) (2001).

<sup>73</sup> 527 U.S. 627 (1999).

<sup>74</sup> Intellectual Property Protection Restoration Act of 2001, S. 1611, 107th Cong. (2001).